

DISCUSSION RESPONSE

The role of the ICC and of non-State actors concerning the protection of cultural heritage

ALESSANDRO CHECHI — VANESSA VUILLE — 10 May, 2017



International cultural heritage law is a vast and complex field of research which involves many actors, as the previous contribution by [Adrianna Michel](#) shows. In response, we would like to give a couple of thoughts on two of the issues raised by the author: the role of the International Criminal Court (ICC), and the role of non-States actors.

Regarding the ICC, the [condemnation](#) of Ahmad Al Faqi Al Mahdi for the destruction of the Timbuktu mausoleums is an important step in the history of the Court: it is the first international case with a focus on the destruction of cultural heritage. The ICC ruled that attacks against the historical and religious monuments of Timbuktu amounted to a war crime based on Art. 8(2)(e)(iv) of the ICC Statute, for which the defendant was sentenced to 9-year imprisonment. Furthermore, this is the first case in front of the ICC to consider the actions of a terrorist movement – Ansar Dine – linked to Al-Qaeda. All in all, the judgment sends a strong message, namely that the international community does not tolerate the destruction of cultural heritage sites.

Nevertheless, it must be pointed out that the *Al Mahdi* case is very particular in many respects and cannot be taken to mean that destruction of cultural heritage in places such as Syria, Iraq or Yemen will certainly be brought before the ICC or another (international or national) court. First, the often-difficult question of evidence was, in the *Al Mahdi* case, easily solved. [Videos](#) showing Al Madhi and other members of the jihadist group Ansar Dine destroying the mausoleums in Timbuktu were found on the Internet. Second, for the first time in the ICC's history, the defendant made an admission of guilt. Third, as a party to the ICC Statute, Mali deferred the situation to the Court pursuant to Art. 13 of the Statute.

Besides the specificities of the *Al Mahdi* case, it should be emphasized that the ICC suffers various political and structural limitations such as referral modalities, difficulty of gathering evidences and erosion of credibility. According to Art. 13 of the Rome Statute, the ICC may exercise its jurisdiction in three circumstances. First, according to the principle of complementarity, a State party may refer to the Prosecutor of the Court a situation when national courts cannot or do not want to act. Apart from this, an individual can be prosecuted by the ICC, even if the crime has been committed in the

territory of a non-State party, when he/she is a national of a State party to the ICC, or when the victim State accepts the jurisdiction of the ICC for this specific case, although is not a party to the Rome Statute (Art. 12-13 Rome Statute). However, it appears that it is unlikely that the States where crimes against cultural heritage are being committed today (such as Syria, Iraq and Yemen) will resort to the ICC in the near future because on the one hand, they are not parties to the Rome Statute, and on the other hand because the political situation on the ground seems to be too unstable at the moment. Second, the ICC may exercise its jurisdiction when the Prosecutor decides *proprio motu* to proceed with an investigation. Third, the UN Security Council, acting under Chapter VII of the UN Charter, may refer a situation to the Prosecutor. This option has been considered by France with respect to the situation in Syria. However, the project resolution launched in May 2014 was vetoed by Russia and China.

In addition to these structural obstacles, the credibility of the ICC itself is eroding. States such as Gambia, Burundi, South Africa and Russia (the latter having only signed the Rome Statute) have recently announced their will to withdraw from the Rome Statute, arguing (among others) that its action against African nations is biased. In addition, the Court has been criticized for its alleged selectivity and inefficiency. Furthermore, powerful, developed countries involved in armed conflicts such as the United States or Israel are not parties to the Rome Statute.

In sum, while it has to be welcomed as a key example concerning the implementation of the international law protecting cultural heritage, one should not exaggerate the ramifications of the judgment in the *Al Mahdi* case.

The second issue that we would like to touch upon relates to the role of non-State actors in protecting and encouraging respect of cultural heritage, law-making and monitoring compliance. In the context of globalization, the system that once comprised a limited number of actors – essentially States and international organizations – now encompasses a host of non-State entities. In the cultural heritage area, the most vocal non-State actors are non-governmental organizations (NGOs), non-State armed groups (NSAGs), museums and art trade businesses. These entities have an ambivalent role in this area of law, because they have the potential to both enhance law enforcement and to place cultural heritage in jeopardy.

On the one hand, the activities of these non-State actors may have a deleterious impact on cultural heritage. This is the case of the destruction of monuments or the looting of artifacts by NSAGs. In this sense, one must recall UN Security Council Resolution 2347 of 24 March 2017. This Resolution defines the unlawful destruction and the looting of cultural property committed by terrorists and organized criminal groups as having an impact on international peace and security.

On the other hand, non-State actors can actively contribute to the protection of cultural objects and to the development of law and policy. An example is provided by Geneva Call, a NGO dedicated to promoting respect by NSAGs for international humanitarian norms in armed conflict and other situations of violence through deeds of commitment. In 2015, upon UNESCO's invitation, Geneva Call has approached a number of groups concerning the issue of cultural heritage protection. The members of many of these NSAGs have declared that they take account of the need to protect certain cultural heritage items when developing their military action – notwithstanding existing rules. Moreover, it appears that a number of NSAGs have chosen to bind themselves to rules regarding the respect of cultural heritage through internal codes of conduct, manifestos and commitment declarations, as Kristin Hausler has shown. For instance, in 1983, at the time

it was a rebel group, the Sudan People's Liberation Movement and Army stated in a manifesto and a resolution that « cultural objects which include religious monuments, buildings such as mosques and churches and various icons are respected » by the group. Other examples can be found in the 1985 Colombian Ejército de Liberación Nacional (ELN) code of war and, more recently, in the National Transitional Council/Free Libyan Army guidelines prohibiting attacks on cultural, educational and religious buildings and historic sites, unless they represent military objectives. According to Hausler, other groups, such as the National Democratic Front of the Philippines (NDFP) and the People's Defence Forces (PKK/HPG), refer to international humanitarian law in general or entire treaties, which themselves contain provisions related to the protection of cultural objects. One could argue that the respect shown by these groups for sites or objects that are part of our cultural heritage, derives from the awareness-raising campaigns developed by NGOs such as the International Committee of the Red Cross.

Beyond the specific context of armed conflict, non-State actors also assume governance roles with respect to the trade in cultural objects. In effect, museums and art trade enterprises play an important role in inciting or discouraging the looting of and illicit trafficking in cultural heritage items if they comply with the strict due diligence requirements spelled out in existing international legal instruments and codes of ethics. In this sense, it is worth mentioning the 'International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences'. Adopted in 2014 by the UN General Assembly, these Guidelines have been developed by the UN Office on Drugs and Crime (UNODC). These Guidelines recognize the criminal character of the trafficking in cultural property and its devastating consequences for the cultural heritage of humankind. Furthermore, they acknowledge the 'growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property' and call on Member States to assess and review their legislation, procedures, and practices 'in order to ensure their adequacy for preventing and combating trafficking in cultural property and related offences'. More importantly, a number of the Guidelines concern the private sector. Not only States are invited to encourage these non-State entities to cooperate in preventing the trafficking in cultural property, but also to criminalize their conduct.

In conclusion, in our view, the legal and judicial developments occurred in recent years that have been summarily described in the previous contribution by Adrianna Michel prove that international cultural heritage law now constitutes a distinct branch of international law. This is one of the consequences of the fact that today cultural heritage is a fundamental value – a “common good” – at all levels, for humankind, States, communities and individuals. More importantly, they demonstrate that, just as for many global problems, action at the international and domestic levels must be complementary and mutually supportive.

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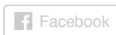
human rights, international dispute settlement, international organizations, and the law of international immunities.

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